Yeshiva Ohr Torah Community School, Inc. d/b/a Manhattan Day School *and* Local 808, International Brotherhood of Teamsters.[1] Case 2–CA–32420

April 25, 2006

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS SCHAUMBER AND WALSH

On December 28, 2000, Administrative Law Judge D. Barry Morris issued the attached decision. The General Counsel filed exceptions and a supporting brief, the Respondent filed an answering brief, and the General Counsel filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions as modified and further explained below and to the extent consistent with this Decision and Order.

I. INTRODUCTION

The complaint alleges that the Respondent, Manhattan Day School (the Respondent or MDS), committed various unfair labor practices related to its subcontracting of bargaining unit work in the summer of 1999. Specifically, the complaint alleges that the Respondent violated Section 8(a)(5) by negotiating the subcontracting clause in bad faith; Section 8(a)(1) by its supervisors' statements about subcontracting; Section 8(a)(3) and (5) by terminating unit employees' employment and subcontracting their work; Section 8(a)(5) by failing to provide information about the subcontracting; and Section 8(a)(3) by constructively discharging two employees. The judge recommended dismissal of all allegations.

Contrary to the judge, we find that the Respondent violated Section 8(a)(1) by informing unit employees of its plan to subcontract work because of their support for the Union. For the reasons below, we adopt the judge's dismissals of all other allegations.

II. FACTS

A. Background

MDS is a nonprofit Jewish elementary school, with revenues derived from charitable contributions, tuition, and the school's trust fund. Teamsters Local 808 (the Union) was certified as the exclusive collective-bargaining representative of the Respondent's kitchen and maintenance employees after an election held March 30, 1998. Supervisor Ismael Vasquez testified that after the election, MDS Executive Director Joshua Samborn instructed him to obtain bids from subcontractors for the maintenance and food service work. Samborn and the Respondent's attorney, Neil Frank, testified that the purpose of the bids was for cost comparison and leverage during negotiations.[2]

Negotiations for a collective-bargaining agreement began in May 1998 and culminated in an agreement signed on April 20, 1999.[3] The subcontracting clause in the agreement stated:

> In the event the Employer decides to contract to another employer for the performance of any work heretofore performed by employees covered under this Agreement, it shall give advance notice to the Union at least one (1) month prior to the effective date of its contracting for such services, or changing contractors, indicating the name and address of the contractor. Employer may subcontract work of employees covered by this Agreement, provided such subcontracting is justified by economic circumstances. In the event work is subcontracted, the Employer agrees to request those subcontractor[s] to employ the employees of the employer then engaged in the particular work to be contracted.

Union Business Representative Osvaldo Loverme and employee Carlos Vargas testified that during negotiations Frank said that he did not believe MDS would subcontract unit work because the employees' wages were below industry standards. Vargas admitted, however, that the Respondent never promised it would not subcontract the work. Loverme also testified that during negotiations Frank defined economic circumstances as excessive employee wages and benefits, but there is no definition of that phrase in the agreement.

Frank notified the Union on June 30:

> In accordance with Article 4, Section 4 of the collective-bargaining agreement, this letter constitutes formal notification that due to economic necessity, Manhattan

[1] We have amended the caption to reflect the disaffiliation of the International Brotherhood of Teamsters from the AFL–CIO effective July 25, 2005.

[2] Vasquez also testified that at about the same time Samborn told him, "It looks like the guys voted yes to the Union." Vasquez asked, "So what's going to happen now?" and Samborn responded, "Nothing. We're just going to fire all of them." Samborn denied making these statements but admitted he told Vasquez that, if MDS and the Union could not come to an agreement, MDS would have to hire different employees. The judge did not resolve the conflict in testimony between Vasquez and Samborn, although he credited other aspects of Samborn's testimony.

[3] All dates are in 1999, unless otherwise specified.

> Day School intends to subcontract its maintenance and kitchen operation to an outside contractor.

The letter listed the name and address of CityWide General Cleaning and Maintenance Service (CityWide) as the subcontractor.[4]

Carlos Vargas and Pedro Martinez, two of the three kitchen employees, resigned in early June. Vargas testified that he began looking for a job after Vasquez told him that MDS intended to subcontract the unit work because it did not want the Union, and if Vargas was in the Union, he "better start looking for a job." Vargas believed that Martinez and employee Ramon Vasquez might have been present during this conversation.[5]

On July 9, Loverme met with Frank and requested bargaining about the subcontracting decision. In a July 28 letter to Frank, Loverme wrote, "The Union requested and has yet to receive information on how the contracting out of work will effect [sic] the school's economy."[6] CityWide began performing the maintenance work on August 1. On August 30, Frank sent information to the Union showing the school's net savings from subcontracting the maintenance work. Subcontractor Essen West began performing the kitchen work on September 1, and Frank sent Loverme copies of the agreements between MDS and both subcontractors later that month.[7]

The Respondent asserted at all times that its motivation for subcontracting was the financial difficulty it was experiencing and the anticipated cost savings of almost $22,000 that it would achieve by subcontracting the maintenance work.[8] The record shows that the Respondent had difficulty paying bills and obtaining supplies (for example, several checks were returned due to insufficient funds) during the months preceding the subcontracting. Frank admitted that, at the time he sent the June 30 notification to the Union, MDS was not aware of any cost savings from subcontracting the kitchen work. However, Samborn testified that the Respondent subcontracted this work to Essen West because it was unable to find adequate replacements after Vargas and Martinez quit.[9]

B. Judge's Decision

The judge recommended dismissal of the complaint in its entirety. He found that the Respondent was entitled to subcontract the unit work under the collective-bargaining agreement's subcontracting clause, which he concluded was not negotiated in bad faith. The judge primarily relied on this conclusion in his brief discussion dismissing each of the alleged violations.

III. ANALYSIS

A. Bargaining in Bad Faith During Negotiations

The General Counsel contends that the Respondent planned to subcontract all unit work from the time of the Union's certification as bargaining representative and that, through intentional misrepresentations, it induced the Union to agree to a subcontracting provision designed to provide legitimate "cover" for its plan. We adopt the judge's finding that the Respondent did not violate Section 8(a)(5) by negotiating the subcontracting provision in bad faith. "[S]imply because a party is unhappy with a contract provision it has agreed to, the Board will not step in to alter the provision's plain meaning." *Prudential Insurance Co. of America*, 275 NLRB 208, 210 (1985), and cases cited therein. If the Union was concerned about the breadth of the subcontracting language, it should have satisfied its concern by negotiating further to define "economic circumstances," rather than relying on Frank's oral statements. The Respondent never promised not to exercise its right to subcontract. The Union was fully aware that the Respondent had solicited subcontracting bids during the negotiating process but nevertheless agreed to the broad language of the subcontracting clause. Under these circumstances, the General Counsel has failed to show that the Respondent used misrepresentations to induce the Union's agreement to the subcontracting provision.[10] We therefore find that the Respondent did not negotiate the collective-bar-

[4] The letter did not list the name or address of a kitchen subcontractor, and CityWide does not perform food service work. Vasquez testified that, when he asked Samborn how long MDS would keep CityWide, Samborn replied that MDS would keep them for about 6 months, and then hire new employees. The judge did not address the credibility of this testimony.

[5] Vargas and Vasquez each testified that Kitchen Manager Aleta Gelb said that the Respondent wanted her to form her own company to perform kitchen work. The judge did not address the credibility of this testimony.

[6] The judge credited Frank's denial that Loverme requested information during their July 9 meeting, but the judge treated the statement in Loverme's July 28 letter to Frank as a request for information.

[7] The contract for the kitchen work is undated.

[8] The judge referred to savings of about $50,000, but the evidence reflects that the extra savings resulted from Maintenance Supervisor Vasquez' termination, which occurred after the events at issue and, thus, could not have been considered in the initial decision to subcontract.

[9] At the Respondent's request, CityWide hired the two unit maintenance employees who applied for work, and Essen West hired the remaining unit kitchen employee.

[10] The negotiations in this case are easily distinguished from those in *Waymouth Farms*, 324 NLRB 960 (1997), enfd. in relevant part 172 F.3d 598 (8th Cir. 1999), cited by the General Counsel. In *Waymouth Farms*, the respondent repeatedly "misrepresent[ed] to the Union its intentions and plans regarding plant relocation while engaged in negotiations with the Union for a plant closure agreement" that terminated the union's status as the employees' bargaining representative. 324 NLRB at 962.

gaining agreement's subcontracting provision in bad faith.

B. Statement of Vasquez

We find, contrary to the judge, that the Respondent violated Section 8(a)(1) by informing unit employees, through the statement of Supervisor Ismael Vasquez, of a plan to subcontract unit work because of employees' support for the Union.[11] Vasquez did not deny making the statement attributed to him by Vargas—that he told Vargas (possibly in the presence of the other kitchen employees) that MDS intended to subcontract unit work because it did not want the Union, and if Vargas was in the Union, he "better start looking for a job." This statement specifically linked the Respondent's subcontracting intentions to employees' union activity, and, contrary to the judge, the contractual subcontracting clause did not privilege Vasquez' coercive statement threatening subcontracting for antiunion purposes. Thus, we find that the Respondent, through Vasquez' statement, violated Section 8(a)(1). See, e.g., *H. B. Zachry Co*., 319 NLRB 967, 969 (1995) (citing *Fontaine Body & Hoist Co.*, 302 NLRB 863, 866 (1991)), enfd. in relevant part sub nom. *Boilermakers v. NLRB,* 127 F.3d 1300 (11th Cir. 1997) ("An employer's statement linking an employee's union activity to his discharge violates Section 8(a)(1).").

C. Subcontracting Unit Work and Terminating Unit Employees

We adopt the judge's finding that the Respondent did not violate Section 8(a)(3) by subcontracting unit work and terminating the unit employees' employment. However, the judge failed to engage in a *Wright Line*[12] analysis of this issue. Under *Wright Line*, the General Counsel must prove, by a preponderance of the evidence, that the employees' protected conduct was a substantial or motivating factor in the employer's adverse action. Once the General Counsel shows a discriminatory motivation by proving the employees' Section 7 activity, and employer knowledge of and animus against that activity, the burden of persuasion "shift[s] to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct." *Donaldson Bros. Ready Mix, Inc.*, 341 NLRB 958, 961 (2004).[13]

We find that, even assuming arguendo that the General Counsel met his initial *Wright Line* burden of showing unlawful motivation, based primarily on the unlawful statement by Vasquez linking subcontracting to employees' support for the Union,[14] the Respondent has met its burden of proving that it would have subcontracted unit work for legitimate business reasons even in the absence of union activity. The credited testimony shows that the Respondent was suffering financial adversity in June 1999. It anticipated an annual cost savings of almost $22,000 by subcontracting maintenance unit work, and it subcontracted the kitchen work because it was unable to find adequate replacements for the two unit employees who quit. In sum, the Respondent met its affirmative rebuttal burden under *Wright Line*. We therefore find that it has not violated Section 8(a)(3).

We are not persuaded by the dissent's criticisms of the Respondent's arguments and evidence in support thereof. For example, our colleague states that no financial reason was offered for subcontracting the kitchen work. However, Samborn credibly testified that he could not find adequate replacements after Vargas and Martinez, two of three kitchen employees, quit in early June. Certainly, the Respondent's lack of available workers to provide necessary food services for the school is an economic circumstance justifying the resort to an outside contractor, whether or not the subcontracting produced any cost savings. In any event, the Respondent did in fact avoid losing money by expeditiously replacing Vargas and Martinez, who quit shortly before the start of the school's revenue-producing summer camp.

[11] The Chairman and Member Walsh find it unnecessary to reach the issue of whether an alleged statement about subcontracting by Kitchen Manager Gelb to Vargas also violated Sec. 8(a)(1), because the finding and remedy would be cumulative. Member Schaumber would dismiss this allegation because he finds that the General Counsel has not proven that Gelb's alleged statement that the Respondent wanted her to form her own company to perform the kitchen work, see fn. 5, supra, violated Sec. 8(a)(1).

[12] *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

[13] Member Schaumber points out that under the Board's *Wright Line* analysis the General Counsel must prove by a preponderance of the evidence that antiunion animus (i.e., Sec. 7 animus) was a substantial or motivating factor in an employer's adverse employment action. It was with this understanding that the Supreme Court approved *Wright Line* as "at least permissible" under the Act. *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 401 (1983) ("As we understand the Board's decisions, they have consistently held that the unfair labor practice consists of a discharge or other adverse action that is based in whole or in part on anti-union animus—or as the Board now puts it, that the employee's protected conduct was a substantial or motivating factor in the adverse action. The General Counsel has the burden of proving these elements under Section 10(c).)" 462 U.S. at 399. Consistent therewith, the Board, administrative law judges, and circuit courts of appeals have sometimes specifically delineated as a fourth element of the General Counsel's initial burden of proof under *Wright Line* proof of a causal nexus. Member Schaumber agrees that identifying a causal nexus as a separate element under *Wright Line* is preferable, lest the burden of proof on this issue be misplaced.

[14] Contrary to the dissent, we place no reliance on testimony by Vasquez that Samborn made statements indicating an antiunion purpose for subcontracting. The judge did not credit Vasquez' testimony.

With respect to the maintenance work, there is an anticipated savings of $22,000. Our colleague argues that the Respondent could have turned to other cost-saving measures, rather than resorting to the subcontracting of maintenance work. However, the bulk of the Respondent's budget is allocated to personnel expenses, and there is no showing that Samborn unreasonably ignored any other options before subcontracting the maintenance work.[15] To be sure, there were other expenses that the Respondent was incurring, but there is no showing that these expenses were avoidable. Indeed, those expenses actually lend additional credence to the need for MDS to curtail expenses where it could do so, i.e., by subcontracting the unit maintenance work.

Our colleague argues that retention of the work would have entailed only a limited increase in labor expenses under the collective-bargaining agreement. This argument also misses the point. As previously stated, there is nothing in the parties' subcontracting agreement that limits "economic circumstances" to bargaining unit labor costs. The Respondent has never argued that its financial difficulties were caused solely, or even primarily, by increased labor costs in the new bargaining agreement. Rather, the Respondent cited its overall financial problems as the circumstance that necessitated the cost-saving subcontracting action. The fact that the Respondent's financial problems were not caused by cost increases for unit employees does not negate the anticipated savings of almost $22,000 resulting from subcontracting unit work.

Finally, our colleague implies that the difference between the Respondent's March 1999 statement of income and expenses (showing over $900,000 net income) and its daily cash report for the same date (showing a negative balance of $104,529.43) somehow undermines its defense. We disagree. At the hearing, the Respondent's accountant thoroughly explained this alleged discrepancy: the statement of income and expenses uses the accrual basis method of accounting, which shows amounts billed as income (even if the payments have not yet been received). In other words, the Respondent may not have actually taken in the full amount of money shown as income, even though it expects to receive the money at some point before the end of the fiscal year. On the other hand, the Respondent's bank account utilizes the cash basis method of accounting, which shows the actual amount of money available in the account on the daily cash report. This explains the situation in which the Respondent could not pay its bills when they became due, because it had not yet received all of the income it expected for the fiscal year (even though the expected payments were shown as net income on its statement). Certainly, the fact that the Respondent uses two different accounting methods for two different types of statements does not lead to the conclusion that the Respondent's argument is invalid. In sum, the Respondent has met its rebuttal burden under *Wright Line*.[16]

D. Failing to Provide Requested Financial Information

We adopt the judge's recommended dismissal of the General Counsel's allegation that the Respondent violated Section 8(a)(5) by failing to provide requested financial information to the Union. The Respondent timely provided cost-savings information regarding its CityWide contract for the maintenance work. Because the Respondent did not anticipate any cost savings for the subcontracting of kitchen work, no such cost savings information existed. The Respondent did, however, provide a copy of its agreement with kitchen subcontractor Essen West. Because the Respondent provided the information that it had with respect to the subcontracting of unit work, we find no violation of Section 8(a)(5) on this basis.

E. Constructive Discharge

Finally, we adopt the judge's recommended dismissal of the General Counsel's allegation that the Respondent violated Section 8(a)(3) by its constructive discharge of

[15] Samborn testified that he did take advantage of several cost-saving approaches that he had not used in the past. For example, he said that he made bartering arrangements with parents who provide services in lieu of part of their children's tuition expenses, so that the Respondent could pay off some of its bills. Samborn also said that he started suing parents for delinquent tuition payments, using a similar barter arrangement with a parent who is an attorney. As the dissent acknowledges, Samborn explored alternate sources for supplies, in addition to negotiating with the suppliers to delay payments. The Respondent also repeated the arguably drastic tactic of borrowing against the school's endowment trust in order to meet expenses.

[16] Inasmuch as we find that the subcontracting provision in the parties' collective-bargaining agreement was negotiated in good faith and that the Respondent would have subcontracted unit work in any event for lawful economic reasons pursuant to this valid provision, we affirm the judge's finding that the subcontracting did not violate Sec. 8(a)(5). We note that the General Counsel challenges the validity of the subcontracting provision, based on the rejected theory that the Respondent negotiated it in bad faith, but does not contend that the Respondent committed any breach of that provision, if valid, which would rise to the level of an 8(a)(5) violation.

The dissent's claim that the Respondent failed to give proper statutory notice and opportunity to bargain about the decision to subcontract unit work turns on the argument, which we have rejected, that the motivation for subcontracting was unlawfully discriminatory. Absent discriminatory motivation, the parties have already bargained to agreement about the Respondent's right to decide to subcontract due to economic circumstances, and the Respondent met its obligation under this agreement of providing a month's advance notice of the intended subcontract.

unit employees Martinez and Vargas. The Board has held that when an employer threatens "some future action which may or may not be carried out," the employer has not imposed intolerable working conditions sufficient to establish constructive discharge until the threat is actually carried out. *Groves Truck & Trailer*, 281 NLRB 1194, 1195 (1986). In such a situation, "no matter how reasonable an employee's feeling of insecurity may be," a violation of Section 8(a)(1) is not converted into an unlawful discharge. Id. at 1195–1196. See also *White-Evans Service Co.*, 285 NLRB 81, 82 (1987) (no constructive discharge where employee resigned prematurely, "anticipating that he would face the choice [between quitting and forgoing union representation] that subsequently confronted other unit employees").

Martinez and Vargas resigned prematurely. Although Vasquez' statement to Vargas before the employees resigned in early June violated Section 8(a)(1), it referred to a possible future action. Martinez and Vargas resigned in anticipation of the threatened unlawful subcontracting of their work, not in the face of it. Therefore, no constructive discharge occurred, and the Respondent did not violate Section 8(a)(3).

REMEDY

Having found that the Respondent has engaged in the unfair labor practice described above, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

ORDER

The National Labor Relations Board orders that the Respondent, Yeshiva Ohr Torah Community School, Inc. d/b/a Manhattan Day School, New York, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees with subcontracting of bargaining unit work because of their union support or union activities.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at its New York, New York facility copies of the attached notice marked "Appendix."[17] Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 1, 1999.

(b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

[17] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

MEMBER WALSH, concurring and dissenting in part.

I. OVERVIEW

Within 4 months after entering into its initial collective-bargaining agreement with the newly-elected Union in April 1999,[1] the Respondent unlawfully threatened some unit employees with discharge, and ultimately unlawfully discharged all of its unit employees and unlawfully subcontracted their work.

My colleagues and I agree that in May the Respondent's building manager, Ismael Vasquez, violated Section 8(a)(1) of the Act by telling kitchen employee Carlos Vargas that the Respondent was going to subcontract the work of the unit employees because the Respondent did not want the Union, and that if Vargas was in the Union, he better start looking for another job.[2] Vasquez' threat came just after the parties entered into their initial collective-bargaining agreement, covering a unit of maintenance and kitchen employees. The agreement was reached following a full year of bargaining—during which the Respondent was, from the start, soliciting bids to subcontract the unit maintenance work.

Contrary to my colleagues, however, I find that the Respondent also unlawfully terminated the unit employees and subcontracted their work in violation of Section 8(a)(3) and (5) of the Act.[3]

[1] All subsequent dates are 1999, unless stated otherwise.

[2] Vargas testified that fellow unit employees Pedro Martinez and Ramon Vargas might have been present when Vasquez made this threat; there is no evidence that they were not present.

[3] I agree with my colleagues' dismissal of the allegation that the Respondent unlawfully failed to provide the Union with information; their dismissal of the allegation that the Respondent violated Sec. 8(a)(5) and (1) of the Act by entering into the subcontracting provisions of the collective-bargaining agreement in bad faith; and their dismissal of the

II. SUBCONTRACTING UNIT WORK AND TERMINATING UNIT EMPLOYEES

A. Facts

On March 30, 1998, immediately following the Union's election victory that day, Vasquez asked the Respondent's executive director, Joshua Samborn, what would happen now that the employees had unionized. According to Vasquez, Samborn replied, "Nothing. We're just going to fire all of them." (Most of the unit employees had been employed by the Respondent for between 8 to 12 years at the time of the election.)[4] Vasquez asked Samborn how he was going to do that. Samborn replied, "Well, there are ways around it. We'll just hire an outside contractor."[5] Samborn then told Vasquez to look in the yellow pages for cleaning companies and find out what it would cost the Respondent to have the building cleaned. Over the next 30 days, through April 30, 1998, the Respondent obtained bids from four cleaning companies to do the maintenance and cleaning work then being done by the unit employees.

About a year later, around March 1999, while the parties were still negotiating for their initial collective-bargaining agreement, Food Services Manager Aleta Gelb told the kitchen employees that the Respondent wanted her to establish her own kitchen services company, and hire her own employees to take over the kitchen services work performed by the Respondent's unit employees.[6]

On April 20, the Respondent and the Union entered into their initial collective-bargaining agreement, which contained a subcontracting clause.[7] In May, as seen, Vasquez unlawfully threatened kitchen employee Vargas (perhaps overheard by kitchen employee Martinez) that the Respondent was going to subcontract the work of the unit employees because the Respondent did not want the Union and that if Vargas was in the Union, he better start looking for another job. Vargas and Martinez resigned on June 11.

On June 30, just 10 weeks after the Respondent and the Union entered into a collective-bargaining agreement covering the maintenance and kitchen employees, the Respondent summarily notified the Union that due to an unexplained "economic necessity" the Respondent was going to subcontract all of the maintenance and kitchen work performed by those employees to CityWide General Cleaning and Maintenance Service (CityWide). (The record establishes, however, that CityWide did not provide kitchen services, either in general or to the Respondent in this instance.) Vasquez asked Samborn how long the Respondent was going to keep CityWide. Samborn said about 6 months, and that after that the Respondent would hire new employees ("[N]ot our guys. Different guys.").[8] On August 1, the Respondent subcontracted its maintenance and kitchen operations and terminated the unit employees.[9] Ultimately, on August 30, the Respondent provided the Union with a copy of a June 14 memorandum from Samborn to the Respondent's attorney, Neil Frank, in which Samborn reported that the Respondent would save almost $22,000 by subcontracting for the performance of its maintenance services.

B. The Subcontracting of Unit Work and Termination of Unit Employees Violated Section 8(a)(3) and (1) of the Act

1. Applicable standard

To prove a violation of Section 8(a)(3) and (1), the General Counsel must first prove, by a preponderance of the evidence, that the employees' protected conduct was

allegation that the Respondent constructively discharged employees Vargas and Martinez in violation of Sec. 8(a)(3) and (1) of the Act.

[4] Samborn's version of this remark is less reckless, but no less revealing. He testified that he told Vasquez on a number of occasions that the Respondent had limited financial wherewithal and that if the parties could not come to an agreement, the Respondent was going to have to hire different employees. The judge did not discuss the difference between Vasquez' and Samborn's versions of Samborn's remark. Indeed, he did not recount either version.

Samborn further testified that he began to explore the idea of subcontracting the unit work when the Respondent began contract negotiations with the Union in April 1998, because he wanted to find out how much money the Respondent would be forced to spend to have its cleaning and maintenance work done by an outside contractor if the Respondent was not able to reach an agreement with the Union on a contract covering the unit employees. Although the Respondent and the Union *did* eventually reach agreement on a contract on April 20, the Respondent nevertheless announced on June 30 that it was terminating the unit employees and subcontracting their work anyway.

[5] In his prehearing affidavit, Vasquez further testified that he then asked Samborn, "[I]sn't it going to cost us more with an outside contractor," to which Samborn replied, "[I]t doesn't matter at the moment. We're not going to let the Union come in and boss us around."

[6] I agree with the Chairman that it is unnecessary to pass on whether Gelb's remark actually violated Sec. 8(a)(1), because such a finding would be cumulative to the Board's unanimous finding here that Vasquez' threat to Vargas discussed above violated Sec. 8(a)(1). Gelb's remark does, however, demonstrate the Respondent's animosity toward the Union, regardless of whether it is also found to be unlawful under the Act.

[7] The subcontracting clause is set out by my colleagues in sec. II,A of their majority opinion, and by the judge in sec. II,A,2 of his attached decision.

[8] Samborn did not deny Vasquez' testimony, nor did the judge discredit it. Indeed, he failed to mention Vasquez' uncontroverted testimony at all.

[9] Subcontractor CityWide began performing the Respondent's building maintenance and handyman unit work on August 1, and subcontractor Essen West began performing the kitchen operations unit work on September 1.

a motivating factor in the employer's adverse action.[10] The General Counsel can make a showing of discriminatory motivation by proving that the employees engaged in union activity, that the employer knew about it, and that the employer had animus toward it (i.e., that the union activity was a substantial or motivating reason for the employer's action).[11] Once the General Counsel establishes these things, the burden of persuasion shifts to the employer to demonstrate that it would have taken the same action even in the absence of the protected conduct.[12]

2. Analysis and conclusion

a. The Respondent's union animus

The General Counsel has clearly established that the Respondent was motivated by union animus to subcontract the unit work and terminate the unit employees. First, the employees engaged in union activity by choosing to be represented by the Union. Second, the Respondent was aware of it. Third, the statements of Samborn, Vasquez, and Gelb, that the Respondent intended to subcontract the unit work and fire all the unit employees because it did not want the Union, fully establish the Respondent's animosity toward the Union and toward the employees' selection of the Union to represent them.

b. The Respondent's asserted economic defense

The collective-bargaining agreement permitted the Respondent to subcontract unit work, but only when the subcontracting was "justified by economic circumstances." The Respondent asserts that its subcontracting of the unit work was justified by economic necessity, and that it would have subcontracted the unit work even if the employees had not unionized. I find that it would not have, and, for the reasons discussed herein, I therefore find that the Respondent has not established its asserted economic defense under *Wright Line*, supra.

There is evidence that the Respondent was experiencing significant financial stress in March–June 1999, particularly an inability to pay all of its bills, resulting in repeated dunning calls from numerous vendors. Nevertheless, and consistent with the Respondent's expressed determination to get rid of the Union, the only significant purported cost-saving measure that the Respondent implemented was subcontracting the unit maintenance work and terminating the maintenance and kitchen unit employees.[13]

No financial reason, however, was ever offered for subcontracting the kitchen work. The Respondent contends that the only reason it subcontracted the kitchen work was because it could not find qualified replacements after Vargas and Martinez quit.

The Respondent introduced evidence showing that on March 31, nine of the Respondent's checks, totaling about $1600, had been presented to the Respondent's bank against insufficient funds. The Respondent's bookkeeper, Martin Waldman, testified that in June, the Respondent could not pay all of its accounts payable. Waldman was receiving daily calls from three to five vendors seeking payment. The Respondent was paying only some of its bills. Yet, the Respondent's statement of income and expenses for fiscal year 1999 (July 1, 1998,–June 30, 1999) shows that as of March 31 the Respondent had income of $4.196 million and expenses of $3.245 million, for net fiscal year income to date of $.951 million—only 90 days before the Respondent notified the Union that it was subcontracting all the unit work because of an unexplained "economic necessity."[14]

Samborn testified that his decision to subcontract the maintenance work was based on the anticipated saving of about $22,000 resulting from the Respondent's subcontracting this work to CityWide.[15] Samborn also testified, however, that the wage increase for the Respondent's maintenance employees provided in the new collective-

[10] *Wright Line*, 251 NLRB 1083 (1980), enfd. 622 F.2d 899 (1st Cir. 1981), cert. denied 495 U.S. 989 (1982); *Manno Electric, Inc.,* 321 NLRB 278, 280 (1996).

[11] See, e.g., *Naomi Knitting Plant*, 328 NLRB 1279, 1281 (1999).

[12] *Wright Line*, supra, 251 NLRB at 1089.

[13] Samborn did testify without elaboration that he "explored" saving money by trying different sources of supply.

[14] According to the Respondent's daily cash report for March, the Respondent had a *deficit* ending cash balance on March 31 of *minus* $104,529.43. When Waldman was asked why the Respondent showed net income on March 31 of $.951 million, but showed a negative checking account balance on March 31 of minus $104,529.43, the following unenlightening colloquy ensued:

> A. (WALDMAN): Because we knew that we were going to spend more in the next few months; in April, May and June.
>
> Q. (COUNSEL FOR THE CHARGING PARTY): But the money was still there on the accounting basis, I mean.
>
> A. On the accounting.
>
> Q. Right.
>
> A. Yes.
>
> Q. So you weren't operating it in that accounting loss on March 31, 1999? It's yes or no.
>
> A. It shows a net income.

Much of Waldman's testimony about the Respondent's finances and financial documents was either confused or demonstrably inaccurate in light of documentary evidence.

[15] The Respondent calculated that its total labor expense (wages and benefits) for the maintenance employees under the terms of the new collective-bargaining agreement was $109,286 per year. The Respondent contracted CityWide to perform maintenance services for the Respondent for $87,300 per year, for a purported saving to the Respondent of $21,986 per year.

bargaining agreement was no more than the wage increase that the Respondent would have granted even if the employees had *not* unionized. The only *increased* labor expense that the Respondent incurred under the new collective-bargaining agreement that it probably would not otherwise have incurred if its employees had not unionized was a contractual uniform allowance of $50 per month for each of the approximately 10 unit employees. This uniform allowance, however, was expressly granted in lieu of the Respondent providing health insurance and pension benefits to the unit employees, and was expressly intended by the parties to compensate the employees in part for the absence of such benefits. Thus, the anticipated increased labor costs for fiscal year 2000 (July 1, 1999,–June 30, 2000) over fiscal year 1999 resulting from the unionization of the maintenance and kitchen employees appears to be limited to the approximately $6000 in annual uniform allowances for the unit employees.

The record establishes, on the other hand, that several other of the Respondent's operating expenses increased substantially from March 1998 to March 1999. Salaries (comprised mostly of faculty and administrative salaries) increased 12 percent, from $1.881 million to $2.105 million. The teachers education account increased 13 percent, from $186.9 thousand to $210.6 thousand. Expenditures for teachers' supplies increased 22 percent, from $29.3 thousand to $35.6 thousand. Miscellaneous administrative expenses increased 58 percent, from $29.8 thousand to $47 thousand. Postage expense increased 82 percent, from $8.7 thousand to $15.8 thousand. "Trips" (not further described) increased 106 percent, from $14.6 thousand to $30 thousand. Again, however, as far as the record shows, the only significant purported cost-saving measure implemented by the Respondent was the subcontracting of the unit work and termination of the unit employees.

Samborn testified that during this time the Respondent borrowed $250,000 from its $1.2 million trust fund (presumably to be repaid by future tuition payments) to pay its bills and meet its payroll. The Respondent also borrowed from its trust fund the year before, in 1998, to meet financial exigencies. But the Respondent did not consider subcontracting its maintenance work until 1999, its first year with a unionized work force, and in the first few weeks under the newly negotiated collective-bargaining agreement.

As seen, the Respondent aggressively foreshadowed its eventual antiunion termination and subcontracting, when, immediately after the Union was elected in March 1998, Executive Director Samborn told Supervisor Vasquez that, because the Respondent did not want the Union, the Respondent would simply fire all of the unit employees and hire an outside contractor. Significantly, in neither Vasquez' nor Samborn's version of this remark did Samborn also refer to any *financial* motive for terminating the unit employees and subcontracting the unit work. Indeed, Samborn told Vasquez that it did not matter if it cost the Respondent *more* to subcontract the unit work, because "We're not going to let the Union come in and boss us around."

Likewise, Gelb's remark to some unit employees, about a year later, in March 1999, telling them that the Respondent wanted her to establish her own kitchen services company, to take over the kitchen services work performed by the Respondent's unit employees, did not refer to any financial reason for a termination of kitchen unit employees and subcontracting of kitchen work. Indeed, as seen, there was *no* financial reason for subcontracting the kitchen work. Similarly, Vasquez' subsequent remark to Vargas in May that the Respondent was going to subcontract the work of the unit employees did not refer to any financial reason for subcontracting. Instead, the only reason asserted by Vasquez for subcontracting was that Respondent did not want the Union. Likewise, Samborn did not refer to any financial consideration in June when he told Vasquez that the Respondent was only going to keep the subcontractor, CityWide, for about 6 months and then hire all new employees to do the unit work after that.

Nevertheless, on June 30, the Respondent notified the Union by letter that due to an unexplained "economic necessity," the Respondent was going to subcontract its maintenance and kitchen work to CityWide. The Respondent did not describe its asserted economic necessity in this letter. It did, however, ask the Union to call the Respondent "so we can arrange to bargain about the issue, at which time we will present and discuss the economics which required the school to subcontract."

The Respondent and the Union did meet on July 9, but, contrary to its promise in its June 30 letter, the Respondent did not present anything to the Union. Indeed, the Respondent did not provide the Union with any even arguable economic justification for its subcontracting until August 30, 2 months after its June 30 subcontracting announcement, and 1 month after the August 1 start of the subcontracting of the maintenance work itself. And even then, the only information that the Respondent finally did provide to the Union on August 30 was simply a copy of a 1-1/2 page June 14 memorandum from Samborn to the Respondent's attorney, Neil Frank, that itemized the Respondent's maintenance and kitchen staff payroll at that time and expressed the wish to subcontract the maintenance services to an unnamed contractor for a

broadly asserted (but not substantiated) annual saving of about $22,000.[16]

The memo from Samborn to Frank also stated that "it does not appear economically advantageous for us to replace the kitchen staff at this time." As seen, the Respondent never subsequently asserted that any cost savings would result from subcontracting the kitchen work.

In sum, then, except for the August 30 copy of the June 14 memo from Samborn to Frank, none of the Respondent's above declarations of its plan to lay off the unit employees and subcontract their work referred in any way to a financial rationale for doing so, and some instead expressly referred to an antiunion purpose. And the June 14 memo asserts a saving from subcontracting only in the broadest of terms.

c. Conclusion

For all of the reasons discussed above, I find that the Respondent has failed to prove by a preponderance of the evidence that it would have terminated the unit employees and subcontracted their work for economic reasons even in the absence of the employees' union activity. Accordingly, I find that the Respondent has failed to rebut the General Counsel's showing that the Respondent took those steps in retaliation for the employees' decision to unionize. Consequently, I find that the Respondent's termination of the unit employees and subcontracting of their work violated Section 8(a)(3) and (1) of the Act.

C. The Subcontracting of Unit Work and Termination of Unit Employees also Violated Section 8(a)(5) and (1) of the Act

The complaint also alleges that the Respondent notified the Union that the Respondent had subcontracted the unit work without prior notice to the Union and without affording the Union a good-faith opportunity to bargain with the Respondent about the decision to subcontract and the effects of that decision, in violation of Section 8(a)(5) and (1) of the Act.

Because the Respondent's decision to terminate the unit employees and subcontract their work was discriminatorily motivated by antiunion reasons in violation of Section 8(a)(3) and (1) of the Act, it cannot be construed as a legitimate entrepreneurial decision, exempt under *First National Maintenance Corp. v. NLRB,* 452 U.S. 666 (1981), from the Respondent's bargaining obligation.[17] Thus, I find that the Respondent also violated Section 8(a)(5) of the Act in this regard.

Moreover, the Respondent's notification to the Union on June 30 that the Respondent "intends" to subcontract its maintenance and kitchen operations to CityWide in reality presented the Union with a fait accompli, because in fact the Respondent had already signed its contract with CityWide 3 weeks earlier, on June 7.

The finality of the subcontracting by the time the Respondent notified the Union about it is further borne out by the language in the closing sentence of Attorney Frank's June 30 fait accompli notice to the Union that the Respondent had already subcontracted the unit work:

> Please call me so we can arrange to bargain about the issue, at which time we will present and discuss the economics which *required* the school to subcontract. [Emphasis added.]

As seen, however, the Respondent presented nothing of the sort to the Union at their subsequent July 9 meeting.

III. TERMINATION OF VARGAS AND MARTINEZ

I agree with my colleagues that the General Counsel has not met his burden of proving that the Respondent constructively discharged employees Vargas and Martinez, simply because they left in response to the Respondent's threat to subcontract the unit work and lay off the unit employees. I write separately on this issue, however, to emphasize that this case is distinguishable from *Rock-Tenn Co.*, 310 NLRB 1139, 149–152 (1995), enfd. 101 F.3d 1441 (D.C. Cir. 1996). In that case, truckdriver Gary Spence resigned on July 8 because he found out that the employer was going to lay off all the drivers on July 31, and he chose not to wait for the actual layoff. The Board found that the July 31 layoff violated Section 8(a)(5). The Board concluded that Spence had been in effect terminated in violation of Section 8(a)(5) because he resigned in advance rather than wait to be unlawfully laid off at the end of the month along with all of the other drivers. The Board held that Spence's backpay would run from July 31, when the layoff was ultimately effectuated.

[16] While I agree with my colleagues' dismissal of the allegation that the Respondent *unlawfully* failed to provide the Union with information, I do find nevertheless that the very limited financial information that the Respondent was ultimately able to provide to the Union fails to lend persuasive support to the Respondent's asserted economic defense that it would have subcontracted all the unit work and terminated all the unit employees for economic reasons even if they had *not* chosen to be represented by the Union.

[17] See *Westchester Lace*, 326 NLRB 1227 (1998), citing *Joy Recovery Technology Corp.*, 320 NLRB 356 fn. 3 (1995), enfd. 134 F.3d 1307 (7th Cir. 1998) (an employer's subcontracting decision cannot be a legitimate entrepreneurial decision exempt from bargaining if antiunion considerations are at the heart of the alleged fundamental change in the direction of the corporate enterprise); *Equitable Resources Energy Co.,* 307 NLRB 730, 732 fns. 9 and 11 (1992), enfd. mem. 989 F.2d 492 (4th Cir. 1993); *Delta Carbonate*, 307 NLRB 118 (1992), enfd. mem. 989 F.2d 486 (3d Cir. 1993); *Continental Winding Co.*, 305 NLRB 122, 125 (1991) (discrimination on the basis of union animus cannot serve as a lawful entrepreneurial decision), citing *Strawsine Mfg. Co.*, 280 NLRB 553 (1986).

In this case, Vargas and Martinez decided to resign in response to Vasquez' statement, in May, that the Respondent intended to subcontract the unit employees' work and lay them off because it did not want the Union. At the time there was no definite plan to subcontract this work and lay the employees off on any particular date. Accordingly, they were not resigning in response to a definite, unlawful decision to lay them off along with other employees; that decision was not made until after their resignation. Accordingly, this case is distinguishable from *Rock-Tenn Co.,* supra, and I agree with my colleagues that Vargas and Martinez were not terminated in violation of Section 8(a)(5) and (3) of the Act.

Conclusion

For all the foregoing reasons, I would find that the Respondent subcontracted all its unit work and laid off its unit employees in violation of Section 8(a)(3), (5), and (1) of the Act.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT threaten you with subcontracting of bargaining unit work because of your union support or union activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

YESHIVA OHR TORAH COMMUNITY SCHOOL, INC. D/B/A MANHATTAN DAY SCHOOL

Suzanne K. Sullivan, Esq., for the General Counsel.
Saul D. Zabell, Esq., for the Respondent.
J. Patrick Butler, Esq., for the Charging Party.

DECISION

STATEMENT OF THE CASE

D. BARRY MORRIS, Administrative Law Judge. This case was heard before me in New York City on May 3–5 and 8–9, 2000. Upon a charge filed on August 31, 1999,[1] and amended on November 24, a complaint was issued on March 17, 2000, alleging that Yeshiva Ohr Torah Community School, Inc. d/b/a Manhattan Day School (Respondent or MDS), violated Section 8(a)(1), (3), and (5) of the National Labor Relations Act (the Act). Respondent filed an answer denying the commission of the alleged unfair labor practices.

The parties were given full opportunity to participate, produce evidence, examine and cross-examine witnesses, argue orally, and file briefs. Briefs were filed by the parties on June 27, 2000.

Upon the entire record of the case, including my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a New York not-for-profit corporation, operates a religious day school in New York City. It has admitted, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. In addition, I find that Local 808, IBT, AFL–CIO (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. The Facts

1. Background

MDS is a nonprofit Jewish elementary school with approximately 400 students. Its revenues come from charitable donor contributions and tuition. On February 26, 1998, the Union and MDS entered into a Stipulated Election Agreement and on April 7, 1998, the Union was certified as the exclusive collective-bargaining representative of Respondent's kitchen and maintenance employees.

2. Subcontracting

The parties began negotiating over the terms of a collective-bargaining agreement in May 1998. Prior to contract negotiations, MDS obtained bids from contractors to evaluate the Union's proposals. Ozzie LoVerme, the Union's business agent, testified that he was aware that contractors were "walking around the property" during negotiations.

During the negotiations the parties negotiated and agreed to the terms of article 4, section 4 of the collective-bargaining agreement, which provides:

[1] All dates refer to 1999, unless otherwise specified.

> In the event the Employer decides to contract to another employer for the performance of any work heretofore performed by employees covered under this Agreement, it shall give advance notice to the Union at least one (1) month prior to the effective date of its contracting for such services, or changing contractors, indicating the name and address of the contractor. Employer may subcontract work of employees covered by this Agreement, provided such subcontracting is justified by economic circumstances. In the event work is subcontracted, the Employer agrees to request those subcontractor[s] to employ the employees of the employer then engaged in the particular work to be contracted.

LoVerme agreed to the subcontracting language on September 1, 1998. The final agreement was signed on April 20, 1999.

Joshua Samborn, executive director of MDS, testified that in May or June 1999 "our financial situation was deteriorating very seriously. Throughout that year, we were having great difficulty in paying our bills. "We were getting four, five, sometimes more phone calls a day from vendors. People were not shipping us." He further testified, "I began to figure out that we could not make payroll at the end of July. It would have been impossible. [I] started to look wherever we could possibly save money and the subcontracting was one in which we were able to save money." Samborn again began discussions with subcontractors and negotiated over prior proposals to subcontract the kitchen and maintenance work. By subcontracting the maintenance work it initially appeared that MDS could save approximately $20,000. Subsequent changes in the subcontracting agreement resulted in savings of more than $50,000.

On June 30, Neil Frank, counsel to Respondent, wrote to the Union, stating that "in accordance with Article 4, Section 4 of the collective bargaining agreement, this letter constitutes formal notification that due to economic necessity, Manhattan Day School intends to subcontract its maintenance and kitchen operations to an outside contractor." The letter listed CityWide General Cleaning and Maintenance Service as the contractor. On July 9, Frank and LoVerme met. Frank testified that LoVerme wanted to bargain about the decision to subcontract and did not want to bargain about severance. LoVerme corroborated this testimony.

On July 28, LoVerme wrote to Frank, requesting that MDS reconsider its decision to subcontract the kitchen and maintenance work. The letter requested information "on how the contracting out of work will [a]ffect the school's economy." On August 1, CityWide commenced its subcontract to perform the building maintenance work. On August 30, Frank wrote to LoVerme, enclosing financial information indicating net savings to the school through subcontracting the maintenance work of $21,986. On September 1, Essen West, Inc. commenced the performance of the kitchen operations. By letter dated September 24 Frank submitted to LoVerme copies of the agreements with CityWide for the maintenance work and with the food service operator.

3. Kitchen employees

Samborn testified that in early June, Pedro Martinez and Carlos Vargas, two of the three kitchen employees, resigned. Samborn testified, "[T]hey quit and I had nobody . . . to replace them. It's not easy to find someone who you can rely upon, who knows what's going on down there, who is familiar with kosher rules and who is willing to work at a reasonable price. So I scrambled over the place, I made a million and one phone calls and I finally was able to hire the son of our food manager." Samborn further testified that that arrangement was not satisfactory and the school negotiated and entered into a contract with Essen West.

B. Discussion and Conclusions

1. Subcontracting

The complaint alleges that Respondent entered into the subcontracting provision in bad faith with the "intention of eliminating the entire bargaining unit." Accordingly, the complaint alleges that Respondent's subcontracting of the unit work violated Section 8(a)(3) and (5) of the Act.

The record shows that during contract negotiations the Union was aware that subcontractors were visiting the school. LoVerme testified that during negotiations Frank said that he didn't "believe" that the school would subcontract. Carlos Vargas, who was present at the negotiations, testified that Frank told LoVerme that he "doesn't feel that they were going to subcontract." When asked whether the school ever "promised" that the work would not be subcontracted, he answered that they never promised and that he believed that pursuant to the contract the work could be subcontracted.

The subcontracting clause requires that Respondent give 1 month's notice prior to subcontracting. The record is clear that a timely notice was given. There is no contention otherwise. The clause also requires that the subcontracting be justified by economic circumstances. Frank advised the Union that there would be a savings of approximately $20,000. Finally, the subcontracting provision requires that Respondent request the subcontractor to employ the present employees. Joel Bates, vice president of CityWide, credibly testified that Samborn requested that he hire the "existing employees from Manhattan Day School." Bates testified that he left applications with Ismael Vasquez, the building manager. He further credibly testified that only two employees returned the applications and that CityWide hired both of them.

I find that the record does not support a finding that MDS entered into the subcontracting provision in bad faith. I further find that Respondent complied with all of the requirements of the subcontracting clause. Thus, faced with severe economic difficulties, pursuant to article 4, section 4 of the collective-bargaining agreement, Respondent was permitted to subcontract. Accordingly, the allegations that Respondent violated Section 8(a)(3) and (5) by subcontracting its unit work are dismissed.

2. Request for information

By letter dated July 28, the Union requested information on "how the contracting out of work will [a]ffect the school's economy." It appears that the Union was asking for information with respect to "decision" bargaining. Indeed, LoVerme testified that at his meeting with Frank on July 9, "I wanted to sit down and negotiate what was going on." Frank replied, "[D]o

you want to discuss severance?" to which LoVerme answered, "[W]e're not here to discuss severance pay." Frank credibly testified that at the meeting he told LoVerme, "I'm here to negotiate with you." LoVerme told Frank that he knew the savings in subcontracting would be about $20,000 and "could I go back to Mr. Samborn and talk to him about reversing the decision." Frank asked LoVerme, "[I]sn't there something that you want me to take back to Mr. Samborn that you want for the men? Because that was really my purpose of being there, which was to negotiate the effects. And he said, no, no. He said, I need for you to change this decision." When asked whether LoVerme asked for financial information at that time, Frank credibly testified "absolutely not." On August 30, Frank sent financial information to LoVerme which indicated a savings to the school of $21,986.

I have already found that article 4, section 4 of the collective-bargaining agreement permitted Respondent to subcontract the work. Respondent was not required to bargain concerning the "decision" to subcontract. Frank offered to bargain concerning the "effects," but LoVerme refused. On August 30, Frank sent the Union the financial information indicated above. I find that Respondent did not violate Section 8(a)(5) by failing to provide the required financial information. Accordingly, the allegation is dismissed.

3. Kitchen employees

The complaint alleges that Respondent violated Section 8(a)(1) of the Act by Aleta Gelb having informed the employees that Respondent wanted her to form a company to perform kitchen operations. The complaint also alleges that Respondent violated Section 8(a)(1) by Vasquez having informed the employees in May 1999 that Respondent had imminent plans to subcontract the unit work. Inasmuch as I have found that Respondent had a right to subcontract unit work pursuant to the collective-bargaining agreement, I do not regard an announcement to that effect as a threat, violative of Section 8(a)(1) of the Act. Accordingly, the allegation is dismissed.

The complaint also alleges that by virtue of these announcements, Respondent caused the termination of two kitchen employees, Pedro Martinez and Carlos Vargas. While the complaint alleges this to be a violation of Section 8(a)(5), the General Counsel's brief states that the two employees were constructively discharged, in violation of Section 8(a)(3). The General Counsel cites *Crystal Princeton Refining Co.,* 222 NLRB 1068, 1069 (1976), where the Board stated:

> There are two elements which must be proven to establish a "constructive discharge." First, the burdens imposed upon the employee must cause, and be intended to cause, a change in his working conditions so difficult or unpleasant as to force him to resign. Second, it must be shown that those burdens were imposed because of the employee's union activities.

Vargas testified that he left MDS in June 1999. When asked, "[D]id you leave on your own?," he replied in the affirmative. I find that the General Counsel has not shown that the employees were constructively discharged. They were not informed that the work would be subcontracted because of their union activities. Rather, they were informed that the work would be subcontracted because, pursuant to the collective-bargaining agreement, Respondent had the right to do so. Accordingly, the allegation is dismissed.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent did not violate the Act in the manner alleged in the complaint.

[Recommended Order for dismissal omitted from publication.]